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No. 90-792

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

vs.

UNITED STATES, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

It is idle to conjecture why the United States and its allies are at such pains to evade, belittle or rewrite the question presented. One might have supposed that the administering agencies and the environmental groups would have welcomed the opportunity to obtain authoritative vindication for their reading of the Clean Water Act. As it is, however, Respondents' Oppositions require us briefly to restate the case in its true dimensions and to show that it is ripe for review in this Court.

1. *Revisionist Facts.* It ought not be necessary in this Court to quibble over facts. But, exercising all possible restraint, we must correct a few erroneous or misleading statements.

a. The Government has not resisted the temptation to "water up" the litigation site. Most of the 100 acres involved in the present petition (see Petition 3) do not constitute "seasonal bodies of water" (U.S. Br. in Opp. i); nor does most of the crystallizer acreage "fill with water during the rainy season, which comes in the winter and spring months." *Id.* at 5. It is disingenuous to borrow the casual shorthand of the court of appeals opinion when the undisturbed findings of the district court, accurately reflecting the record, describe a very different reality. See Petition 4-5. Here, at least, the other Respondents are more candid, stating that, in contrast to the "seasonally ponded" acreage (actually only 14 acres, Pet. 4 n.4), "[s]ome of these areas are 'ephemerally ponded,' that is, ponded only for a period of days or weeks after rainstorms." Save S.F. Bay Ass'n Br. in Opp. 2. See also *id.* at 6, 10. We add only that much of the "ponding" consists of a few inches of rainwater in the bottom of plowed furrows, and does not create anything resembling a shallow "lake" or "water body." See Pet. 4 n. 4; Pet. App. A-29, A-34 to A-35.

b. Equally misleading is the insistence of all Respondents that the "waters" in suit are not truly "isolated."[1] This is fudging. The

[1] This is accomplished by various means: by discussing the southern wetland "tips" or "corners" which are *not* before this Court; by characterizing those areas as "tidal," even though the District Court found

dispositive fact is that the only remaining assertion of jurisdiction over the former crystallizers and calcium chloride pits is on the basis that they constitute "other waters"—by definition isolated waters—whose only link to interstate commerce is claimed to be their use by migratory birds or endangered species. See Pet. App. A-8 to A-9, A-11 to A-12; U.S. Br. in Opp. 7, 10 n.9. It is far too late in the day to change the jurisdictional foundation of the case. Nor will it do to rewrite the Corps' regulations to obliterate the distinction there made between tidal and interstate waters and their adjuncts, on the one hand, and "other waters" isolated from the first class, on the other hand.

c. Finally, Respondents leave the impression that an endangered species, the salt marsh harvest mouse, uses the 100 acres still in dispute as habitat. U.S. Br. in Opp. 6; Save S.F. Bay Ass'n Br. in Opp. 11. The fact is that the only such rodents were found on or near the parcel corners no longer in suit. See *Id.* at 3. Nor are the crystallizers and pits of the remaining area potential habitat for the salt marsh harvest mouse. Accordingly, the reiterated references to "endangered species" are now anachronistic.

2. *Ripeness and Importance of the Issue.* There is no merit to the several pleas in avoidance now interposed: that the question we seek to present was addressed below only "somewhat obliquely" (U.S. Br. in Opp. 20) or not at all (Save S.F. Bay Ass'n Br. in Opp. 9-12); that it is "premature" or "not ripe for review" (U.S. Br. in Opp. 8-9, 20; Save S.F. Bay Ass'n Br. in Opp. 6-9); that it may become "moot" (U.S. Br. in Opp. 20; Save S.F. Ass'n

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otherwise (Pet. App. A-29 to A30) and the Court of Appeals did not reach the question (Pet. App. A-4 to A-5 n.5); by implying that Newark Slough is "adjacent" to the areas in dispute (see Save S.F. Bay Ass'n Br. in Opp. 10), notwithstanding that it is a quarter mile from the now irrelevant Parcel 10 (Pet. App. A-19) and about half a mile from any waters still in the case; and by baldly asserting that "[t]he property" (without distinguishing the "corners" no longer in dispute) is "an integral part of the San Francisco Bay estuary and wetland system" (Save S.F. Bay Ass'n Br. in Opp. 10), or, more modestly, that the waters before this Court "could reasonably be regarded as part of the same ecosystem" as the discrete corners "subject to tidal inundation by San Francisco Bay." U.S. Br. in Opp. 10 n.9.

Br. in Opp. 6, 9-10); and, in any event, that the issue has little practical importance (U.S. Br. in Opp. 21-22; Save S.F. Bay Ass'n Br. in Opp. 28-29).

a. Although the court below disposed of the argument swiftly,even cavalierly, there is no doubt that our question *was* decided, and there is no ambiguity about *how* it was decided. The court squarely held that the Clean Water Act "is broad enough to extend the Corps' jurisdiction to *local* waters which *may* provide habitat to migratory birds and endangered species." Pet. App. A-12 (emphasis added). In context, it is clear that "local" refers to "waters" embraced by the "other waters" regulation (33 C.F.R. 328.3(a)(3), Pet. App. A-44 to A-45)—which is to say, "isolated waters," unconnected to any tidal water, any interstate waterway, or any tributary of such waters. See Pet. App. A-11. Likewise, the reference to waters that "may" provide habitat to migratory or endangered species obviously invokes, and treats as legitimate, the so-called "EPA criteria" published in 1986 which extended jurisdiction to areas that "are or would be" used as habitat by migratory birds or endangered species. Pet. App. A-11 to A-12.

b. Nevertheless, because the court of appeals remanded the case, it is said review here would be premature. As we said in the petition (Pet. 22-23), the issue in no event will be mooted on remand since it is undisputed that some portion of the litigation site is the actual or potential habitat of some migratory birds and otherwise satisfies the standard approved by the court of appeals for "other waters" See Pet. 7, 22.[2] Accordingly, the question will remain in the case no matter how the "habitat" area is precisely delimited.[3]

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[2] We do not, of course, concede that the areas subject to only "ephemeral" ponding fall within the regulation. See Pet. 6 n.7; Save S.F. Bay Ass'n. Br. in Opp. 9-11.

[3] It is suggested by intervening respondents that the question presented would be mooted if the district court, on remand, were to uphold petitioners' estoppel plea. S.F. Bay Ass'n Br. in Opp. 6. Alas, that prospect is almost certainly foreclosed in respect to the Corps' present ground for asserting jurisdiction, a ground not available to it

Mere incantation of hoary formulae does not answer our submission that this is one of those instances in which the Court's intervention is appropriate notwithstanding the technically interlocutory character of the judgement because a significant legal question urgently calling for resolution is unavoidable and further skirmishing in the lower courts will only be wasteful.

c. Equally misleading is the claim that this Court need not hear the case because there is no conflict among the lower courts. Not only have substantial doubts been expressed in three Circuits, but the fact is that the United States' acquiescence in the Fourth Circuit's invalidation of the migratory bird "regulation" in *Tabb Lakes* (albeit on procedural grounds) creates a conflict between the substantive law applied in the States within the Fourth Circuit and that applied in the rest of the country. See Pet. 20-21.[4] Here, as we have explained, the issue tendered is the one the Court pointedly reserved in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n.2, 138 n.8 (1985). If our submission on the merits is correct and those who administer the Clean Water Act have gone far beyond the limits set by Congress, with significant practical consequences, that is reason enough for the Court to intercede.

d. This brings us to perhaps the most startling of the Government's representations: that, contrary to our allegation, the decision below will have no far-reaching consequences, both because "cases in which the only connection to interstate commerce is use by migratory birds have been rare"—and, presumably, will continue to be so—and because it is "not clear at this point that petitioner will be denied permission to develop or significantly limited in the manner it may do so." U.S. Br. in Opp. 21-22. We

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when the United States expressly or impliedly disclaimed jurisdiction before 1985.

[4] As we have noted, the Government appears to be in no hurry to end this dual legal regime by initiating formal APA rulemaking. One advantage of delaying such a proceeding is presumably to avoid the serious risk of provoking an adverse ruling *on the merits* in the Fourth Circuit, given the "grave doubts" articulated in *Tabb Lakes*, and thereby creating a square conflict.

have already dealt with the second point. See Pet. 10, 22-23. The suggestion that cases like ours are numerically insignificant merits a word of rebuttal, however.

Given the novelty of asserting migratory bird use as a ground for asserting jurisdiction (see pp. 9-10, infra), it is not surprising that litigated cases so far have been few. But that does not tell us how commonplace will become such assertions of jurisdiction if this Court leaves the present ruling undisturbed. We stand by our estimate that "tens of millions" of acres will be affected--a conclusion based on official Government publications. See Pet. 8-9 n. 10.[5] We may add that the filings of the concerned amici supporting our petition afford at least some evidence that the effect of the decision below is more than marginal.[6]

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[5] Although the Fish and Wildlife Service apparently once supplied a figure of 13 million acres for "isolated wetlands" (Save S.F. Bay Ass'n Br. in Opp. 28 n. 13), that presumably did not include the very substantial Alaskan acreage. See Br. *A.C.* of Pacific Legal Foundation 9. At all events, as Senator Chafee remarked in the oversight hearings he chaired in 1985, the issue now presented involves a "tremendous number of wetlands." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 121 (1985) (hereinafter "*1985 Oversight Hearings*"). See, also, *id.* at 229.

[6]See Brief *Amicus Curiae* of the National Association of Industrial and Office Parks, International Council of Shopping Centers, Inc., National Association of Home Builders, National Multi Housing Council, and National Realty Committee in Support of Petitioners 3, 5, 9, 13; Brief Amicus Curiae of Pacific Legal Foundation and National Cattlemen's Association in Support of the Petition for Certiorari 2, 9; Brief of the American Forest Council, the American Paper Institute and the National Forest Products Association as *Amici Curiae* in Support of Petitioners 3, 8-11; Brief of *Amicus Curiae* American Mining Congress in Support of Petitioners 3; Brief of the Foundation for Environmental & Economic Progress as *Amicus Curiae* in Support of Petitioners 2, 5, 6-9.

Nor is there any basis for the claim that other links to interstate commerce will greatly diminish the impact of the challenged ground of jurisdiction. U.S. Br. in Opp. 21. No doubt, some isolated waters that

3. *Congressional Intent.* At the end of the day, the submission of respondents is that, in enacting the Clean Water Act, Congress wholly abdicated its defining function, eschewing any decision as to what effects on interstate commerce would justify federal regulation of local waters, and left the administering agencies entirely free to search out, from time to time, the constitutional limits of geographic jurisdiction, relying on the judiciary, if and when called upon, to curb any overstepping of the Commerce Clause. To say the least, there are serious problems with this scenario.

a. One may question the legitimacy of such a sweeping delegation of legislative power "not canalized within banks that keep it from overflowing," but "unconfined and vagrant." See *Schechter v. United States,* 295 U.S. 495, 551 (1935) (Cordozo, J., concurring). Perhaps more immediately, however, doubts arise about the constitutional propriety of an *administrative* invocation of Commerce Clause power to reach wholly isolated sites on the sole ground that they may be used by out-of-state birds. It is far from clear that Congress itself could expressly legislate such a result, at least in respect of use by *unprotected* migratory birds, many of which are not even waterfowl. See Br. A.C. of Pacific Legal Foundation 16-19.[7] But, even if Congress could do so, on the basis of full legislative consideration and articulated findings, it does not follow that a mere administrative agency, acting without an explicit Congressional mandate, is equally free to exercise constitutional power to the same boundary. Special

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attract migratory birds or endangered species will also attract interstate human visitors and a few will breed fish destined for out-of-state markets. E.g., *United States v. Byrd,* 609 F.2d 1204, 1210 (7th Cir. 1979); *Utah v. Marsh,* 740 F.2d 799, 803-804 (10th Cir. 1984). But that will not usually be the case with respect to the more typical, relatively small, non-navigable isolated waters or wetlands—especially when, as here, the site is mainly used by ordinary upland birds of no special interest to hunters or birdwatchers.

[7] Indeed, at the oral argument of *Riverside Bayview Homes,* at least one Member of the Court seemed dubious whether an "aerial connection" through migrating bird use could bring isolated waters or wetlands within the sway of the Commerce Clause. Tr. Or. Arg. 21-24.

deference is due to the constitutional determination of legislators directly entrusted by the Constitution itself with the task of assessing the need for national solutions. *E.g., Katzenbach v. McClung,* 379 U.S. 294, 303-305 (1964); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 276-27 (1981); *Metro Broadcasting v. F.C.C.,* 111 L.Ed.2d 445, 462-464 & nn. 11-13 (1990). No like presumption operates in favor of implementing agencies, whose "expertise" and practical experience justifies deference to their reading of statutes, but not the Constitution. See *Hampton v. Mow Sun Wong,* 426 U.S. 88, 103-104, 114-116 (1976); *Greene v. McElroy,* 360 U.S. 474, 507 (1959).[8]

b. Moreover, constitutional objections aside, it must be deemed most unlikely that Congress would legislate so irresponsibly. If the Constitution sets the only boundary, there is nothing to prevent the agencies from regulating for reasons that are unrelated—or only very remotely related—to the legislative goals. Thus, although Congress was concerned with water quality, EPA and the Corps of Engineers, goaded by the Fish and Wildlife Service, might be inclined to preserve isolated waters whose filling would in no way affect the objective of clean water, but *would* prejudice commercial fish or migratory birds or other wildlife. As we have noted, the United States itself has vigorously argued that the Corps of Engineers was given no such broad power in the Clean Water Act. See Pet. 18 & n. 20.

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[8]We do not press the constitutional question here because it is a rare case in which a regulation that oversteps constitutional boundaries is to be voided on that ground. Absent the clearest indication to the contrary, one must of course assume that Congress did not intend to authorize the administrators to act unconstitutionally, and, accordingly, the excessive regulation normally should be faulted as unauthorized. See *Greene v. McElroy, supra; Cable Television Ass'n v. United States,* 415 U.S. 336, 342 (1974). That is our present submission. At the least, one is entitled to doubt that, absent a clear statement of such an intention, Congress meant to unleash those charged with implementing the statute to cross into such dangerous territory. See Tribe, *American Constitutional Law* 316-317 (2d ed. 1988).

c. To be sure, it is said that we read the goals of the Act too narrowly and we are reminded that the statute expressly adverts to protecting "fish, shellfish and wildlife." U.S. Br. in Opp. 11. This is a false point. Of course, the underlying reasons for wishing to achieve clean water include protection of wildlife, as well as protection of the human population, concern for "aesthetic, recreation and economic values," and the facilitation of navigation. See 33 U.S.C. 1343(c)(1)(A)-(C), 1344(b) & (c). And the ability of a waterbody to sustain fish and shellfish is also a stated test of water quality. 33 U.S.C. 1251(a)(2). The fact remains, however, that the focus of the Clean Water Act is *pollution*; whatever benefits result, the Congress was here concerned to "restore and maintain the . . . integrity of the Nation's waters." 33 U.S.C. 1251(a). If we were dealing with a wildlife protection statute, it would not permit—as the Clean Water Act does—the destruction of fish or bird or animal habitat by any means other than the discharge of pollutants. See Petition 11-12.

d. We do not find in the Respondents' Briefs any serious response to our points on the statutory text and the legislative history of the 1972 statute. See Petition 13-17. Much reliance is placed, instead, on a few remarks made during the 1977 amendments to the Clean Water Act, together with the suggestion that Congress then approved the Corps' more expansive regulations promulgated that year. This is accompanied by repeated invocation of this Court's decision in *Riverside Bayview Homes, supra,* without any recognition of the very limited holding there vindicating only the regulation of wetlands immediately *adjacent* to true navigable waters, not *isolated* waters.

When all is said and done, however, Respondents can point to only one statement explicitly treating "isolated wetlands and lakes" as properly within the Corps' jurisdiction. U.S. Br. in Opp. 14. That was the comment of a single Representative in an extension of his oral remarks—hardly an authoritative statement of what the Congress as a whole intended. At all events, there is *not a word* remotely suggesting that jurisdiction could be predicated on the use, or potential use, of a site by migratory birds. That adventurous idea was first mentioned in *1985* Hearings—obviously much too late to illumine the intent of the Congress

that wrote Section 404 in 1972. See Save S.F. Bay Ass'n Br. in Opp. 13, 23-26. As Judge Rymer noted here, the argument for legislative ratification of regulations in this context is not remotely comparable to what the Court endorsed in *Riverside*. See Pet. App. A-13 to A-14 n. 1.

4. *Administrative Construction.* We have submitted that the administrative construction of the Clean Water Act reflected in the 1986 "advice" about migratory bird use as a sufficient interstate commerce nexus is not arguably a "reasonable" reading of the statute and, accordingly, must be rejected. Pet. 17-18. We added that deference to the Corps' new statutory construction was in any event inappropriate, given that the new ground of jurisdiction was only espoused in 1985—13 years after the statute was enacted—and, even then, under duress, not as a consequence of a well-considered expert judgment based on experience. Pet. 18-20. The Government now responds that the migratory bird use rule was *not* born in 1985, but in fact dates back at least to 1977, the only new feature being the acceptance of mere *potential* use as sufficient. U.S. Br. in Opp. 18-19 & n.15. At this point, we must cry "foul."

a. The evidence cited by the Government—the belated and self-serving statement of Acting Assistant Secretary of the Army Dawson during the 1985 Oversight Hearings (U.S. Br. in Opp. 18)—simply is not credible, and was not credited by the questioning Senators. See *1985 Oversight Hearings* at 105-106, 113-115, 121. Earlier in the hearing, Mr. Dawson declined to answer the direct question by Senator Mitchell whether he agreed "that isolated wetlands are within the Corps' section 404 jurisdiction where they are used by migratory fowl, waterfowl, which establishes the interstate basis for jurisdiction." *Id.* at 115. *See also id.* at 116.[9] The truth is that, under continuing pressure from the

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[9] Note that the formulation, at this stage, is limited to *actual* use by *waterfowl*. Even so, Mr. Dawson could not commit himself, orally or, later, in writing.

Still earlier, Mr. Dawson had expressed his view that "Section 404 is not a federal land use control statute" or "a wetland protection mechanism." *1985 Oversight Hearings* at 37, 61. He was duly taken to task for

Committee, the Corps eventually accepted the full migratory bird use rule. See *id.* at 168, 171-172, 203, 204-205, 208-209, 212. But that is a far cry from a showing that it was always accepted. See generally Save S.F. Bay Ass'n Br. in Opp. 23-36. It is no accident that migratory bird use was never articulated as a sufficient link with interstate commerce in any regulation or other written directive before 1985. See 1975 Corps Regulations, 40 Fed. Reg. at 31324; 1977 Corps Regulations, 42 Fed. Reg. at 37144; 1982 Corps Regulations, 47 Fed. Reg. at 31810-31811; 1983 Proposed Corps Regulations, 48 Fed. Reg. at 21474-21475. Whatever individual Districts might do, it was *not* general Corps policy to assert jurisdiction on any such basis. See, *e.g.*, *id.* at 113-115, 121-123.

b. At all events, the *matter* was fully aired and decided in *Tabb Lakes*, supra. The District Court there expressly found that the migratory bird use criterion announced in 1985 effected "a change in Corps policy" which carried "far-reaching" consequences. 715 F.Supp. at 728, 729. As we have noted, that decision was affirmed by the Fourth Circuit "on the district court's opinion." 20 ELR at 20009, 30 ERC at 1511. That should be the end of the matter.

For the reasons stated here and in the Petition, a writ of certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

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those remarks (*id.* at 37, 96, 99), his nomination as Assistant Secretary was opposed on this ground (*id.* 298-301, 315-317), and the nomination hearing was postponed (*id.* at 156-157).